

1 MAURICE D. PESSAH (SBN: 275955)

2 *maurice@pessahgroup.com*

3 **PESSAH LAW GROUP, PC**

4 9100 Wilshire Blvd., Suite 850E

5 Beverly Hills, CA 90212

6 Tel: (310) 772-2261

7 Attorneys for Defendants,

8 MEDIALAB.AI, INC. and

9 MICHAEL HEYWARD

10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 TOM LEHMAN,

13 Plaintiff,

14 v.

15 MEDIALAB.AI, INC., a Delaware
16 corporation, OTIN HOLDINGS,
17 LLC, a Delaware limited liability
18 company, MICHAEL HEYWARD,
19 an individual, and DOES 1-10,
20 inclusive,

21 Defendants.

Case No: 2:23-cv-09055

**DEFENDANTS MEDIALAB.AI, INC.
AND MICHAEL HEYWARDS
NOTICE OF MOTION AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS COMPLAINT
PURSUANT TO FRCP 12(b)(1), OR IN
THE ALTERNATIVE, DISMISS
FRAUD CLAIM PURSUANT TO
FRCP RULES 9(b) AND 12(b)(6) AND
MOTION TO STAY**

*[Filed concurrently with Declaration of
Maurice Pessah and [Proposed] Order]*

Response Deadline: January 15, 2024

Hearing Date: February 26, 2024

Time: 10:00 a.m.

Courtroom: 8D

Judge: Hon. Christina A. Synder

Complaint Filed: October 26, 2023

Trial Date: None Set

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TO THE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN THAT on February 26, 2024, at 10:00 a.m. or at such time thereafter as the matter may be heard before the Honorable Christina A. Snyder, in Courtroom 8D of the United States Courthouse for the Central District of California, 350 W. First Street, Eighth Floor, Los Angeles, California 90012, Defendants MediaLab.Ai, Inc. (“MediaLab”) and Michael Heyward (“Heyward,” together with MediaLab, “Defendants” and each, a “Defendant”) will and hereby does move the Court to dismiss the Complaint (ECF No. 3-1) pursuant to Federal Rule of Civil Procedure (“Rule”) 12(b)(1) for lack of subject matter jurisdiction. In the alternative, Plaintiff moves dismiss the fraud claim pursuant to Rule 9(b) for failure to plead fraud with particularity, and Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Additionally, Plaintiff requests this Court stay the action pending the completion of a pending arbitration between Claimant Tom Lehman and Defendant MediaLab.

On December 7, 2023, counsel for Defendants and Plaintiff Tom Lehman met and conferred via telephone. (Declaration of Maurice Pessah [“Pessah Decl.”] ¶ 7).

As set forth in the accompanying Memorandum of Points and Authorities, there is good cause for the relief requested. Plaintiff’s complaint fails to plead subject matter jurisdiction, to describe the alleged fraudulent representations with requisite particularity under Rule 9(b), fails to plead alter ego liability and fails to allege facts sufficient to state the claim under Rule 12(b)(6). Moreover, as the economic loss rule bars the requested relief under the claim of fraud and therefore no legally cognizable claim can be plead under Rule 12(b)(6).

This Motion is based on this Notice of Motion and Motion; the accompanying Memorandum of Points and Authorities; the pleadings and papers filed in this action; and such further argument and matters as may be offered at the time of the hearing of this Motion.

1 Dated: January 15, 2024

PESSAH LAW GROUP, PC

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4 By: /s/ Maurice Pessah

5 Maurice D. Pessah
6 Attorneys for Defendants,
7 MEDIALAB.AI, INC. and
8 MICHAEL HEYWARD
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Tom Lehman (“Plaintiff” or “Lehman”) has sued defendants MediaLab.AI, Inc. (“MediaLab”), Otin Holdings LLC (“Otin Holdings”), Michael Heyward, (“Heyward”) and DOES 1-10 for alleged breach of contract, tortious interference with contract and fraud. Defendants MediaLab and Heyward (“Defendants”) bring this motion to dismiss Plaintiff’s unredacted Complaint (the “Complaint”) pursuant to Fed. R. Civ. P. 12(b)(1), or in the alternative, motion to dismiss Plaintiff’s fraud claim pursuant to F.R.C.P. 9(b) for failure to plead fraud with particularity and F.R.C.P. 12(b)(6) and to state a claim upon which relief can be granted (the “Motion”). Plaintiff’s Complaint fails to plead subject matter jurisdiction, alter ego liability, and to describe the key allegations with particularity.

Here, the basic factual contentions required to plead diversity jurisdiction and fraud, including the principal place of business of Otin Holdings, alter ego claims, specific misrepresentations contested as fraudulently made, and dates of such alleged misrepresentations, are conspicuously missing from the operative pleading. Read most-charitably, the Complaint ultimately sounds in breach of contract, with no harm alleged beyond non-payment under a contract. Defendants therefore respectfully request that this Court dismiss Plaintiff’s Complaint for lack of subject matter jurisdiction.

In the alternative, Defendants requests dismissal of Plaintiff’s Third Cause of Action for Fraud, without leave to amend. Additionally, Plaintiff and MediaLab are concurrently engaged in an arbitration based upon the same nucleus of operative facts. Specifically, MediaLab acquired a company, Genius, where Plaintiff served as its chief executive officer. As part of the acquisition, Plaintiff and Defendants concurrently entered into two agreements. Importantly, Plaintiff and MediaLab executed an employment agreement that mandates that all disputes be resolved in binding arbitration. Thus, should the Court deny Defendants’ motion to dismiss the

1 Complaint, Defendants request the Court to stay this action until the arbitration has
2 been concluded.

3 **II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY**

4 On September 13, 2021, Plaintiff and MediaLab simultaneously entered into
5 two agreements, a September 13, 2021 Put Agreement and a September 13, 2021
6 Employment Agreement. (Compl. at ¶ 23, ECF No. 3-1).

7 On September 28, 2023, Plaintiff Tom Lehman initiated a petition for an order
8 compelling arbitration against MediaLab in the Superior Court of California, Los
9 Angeles. (Declaration of Maurice Pessah [“Pessah Decl.”] ¶ 3)

10 On June 8, 2023, Plaintiff initiated arbitration before JAMS (the
11 “Arbitration”) against Defendant MediaLab to enforce the Employment Agreement
12 (Compl. ¶ 33, ECF No. 3-1). The claims in Arbitration arise out of the same nucleus
13 of facts set forth in the Complaint, specifically that MediaLab acquired Genius
14 Media Group and two simultaneous agreements were entered into, the Employment
15 Agreement, and the other the Put Agreement. In the Arbitration, Plaintiff is alleging
16 that MediaLab failed to pay Lehman’s retention bonus arising out of the
17 Employment Agreement. (Compl. ¶ 34, ECF No. 3-1). The Arbitration is at issue.

18 On November 9, 2023, Plaintiff served MediaLab with the Complaint in this
19 action for breach of contract, fraud, *inter alia*. (“Pessah Decl.” ¶ 4).

20 On November 27, 2023, the parties filed the first stipulation to extend
21 MediaLab’s response deadline to Plaintiff’s Complaint by 14 days, pursuant to
22 Local Rule 8-3. (Pessah Decl. ¶ 5).

23 On December 4, 2023, the parties filed the second stipulation to extend
24 MediaLab’s response deadline to Plaintiff’s Complaint by an additional 16 days,
25 pursuant to Local Rule 8-3. (Pessah Decl. ¶ 6).

26 On December 7, 2023, counsel for Defendants and Plaintiff met and conferred
27 via telephone pursuant to Local Rule 7-3. (Pessah Decl. ¶ 7).

28 On January 9, 2024, the Court ordered that Defendant MediaLab.Ai, Inc.’s

responsive pleadings to Plaintiff's Complaint be due on January 15, 2024. (Ord. Extending Answer Due Deadline, ECF No. 25). This Motion followed.

III. LEGAL STANDARD

A. Subject Matter Jurisdiction

"Federal courts are courts of limited jurisdiction, and are presumptively without jurisdiction over civil actions." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The burden of establishing the contrary rests upon the party asserting jurisdiction. *Id.* Because subject matter jurisdiction involves a court's power to hear a case, it can never be forfeited or waived. *United States v. Cotton*, 535 U.S. 625, 630 (2002). Accordingly, lack of subject matter jurisdiction may be raised by either party at any point during the litigation, through a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1).⁴ *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006); *see also Int'l Union of Operating Eng'rs v. Cnty. of Plumas*, 559 F.3d 1041, 1043-44 (9th Cir. 2009). Lack of subject matter jurisdiction may also be raised by the district court sua sponte. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). Indeed, "courts have an independent obligation to determine whether subject matter jurisdiction exists, even in the absence of a challenge from any party." *Id.*; *see* Fed. R. Civ. P. 12(h)(3) (requiring the court to dismiss the action if subject matter jurisdiction is lacking).

There are two types of motions to dismiss for lack of subject matter jurisdiction: a facial attack and a factual attack. *Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). A party may either make an attack on the allegations of jurisdiction contained in the nonmoving party's complaint, or may challenge the existence of subject matter jurisdiction in fact, despite the formal sufficiency of the pleadings. *Id.*

In the case of a factual attack, "no presumptive truthfulness attaches to plaintiff's allegations." *Thornhill*, 594 F.2d at 733 (internal citation omitted). The party opposing the motion has the burden of proving that subject matter jurisdiction

1 does exist, and must present any necessary evidence to satisfy this burden. *St. Clair*
 2 *v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). If the plaintiff's allegations of
 3 jurisdictional facts are challenged by the adversary in the appropriate manner, "the
 4 plaintiff cannot rest on the mere assertion that factual issues may exist." *Trentacosta*
 5 *v. Frontier Pac. Aircraft Ind., Inc.*, 813 F.2d 1553, 1558 (9th Cir. 1987) (quoting
 6 *Exch. Nat'l Bank of Chi. v. Touche Ross & Co.*, 544 F.2d 1126, 1131 (2d Cir. 1976)).
 7 Furthermore, the district court may review any evidence necessary, including
 8 affidavits and testimony, in order to determine whether subject matter jurisdiction
 9 exists. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988); *Thornhill*, 594
 10 F.2d at 733. "If the nonmoving party fails to meet its burden and the court
 11 determines that it lacks subject matter jurisdiction, the court **must** dismiss the
 12 action. Fed. R. Civ. P. 12(h)(3)." *Sec. Nat'l Ins. Co. v. United States*, No. 2:13-cv-
 13 01594-MCE-CKD, 2014 U.S. Dist. LEXIS 17312, at *4-6 (E.D. Cal. Feb. 10, 2014)
 14 (*emphasis added*).

15 Subject matter jurisdiction is conferred on federal courts either through
 16 diversity jurisdiction pursuant to 28 U.S.C. § 1332 or through federal question
 17 jurisdiction pursuant to 28 U.S.C. § 1331. *Peralta v. Hispanic Bus., Inc.*, 419 F.3d
 18 1064, 1068 (9th Cir. 2005).

19 ***1. Diversity Jurisdiction***

20 The basis of diversity jurisdiction is found at Title 28 U.S.C. § 1332. Diversity
 21 jurisdiction exists when there is complete diversity of citizenship between the
 22 parties, and the amount in controversy exceeds \$75,000 28 U.S.C. § 1332(a);
 23 *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996). Section 1332(a) requires complete
 24 diversity. *Id.* "In a case with multiple plaintiffs and multiple defendants, the
 25 presence in the action of a single plaintiff from the same State as a single defendant
 26 deprives the district court of original diversity jurisdiction over the entire action."
 27 *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 553 (2005). The burden of
 28 establishing that diversity jurisdiction exists rests on the party asserting it. *Hertz*

1 *Corp. v. Friend*, 559 U.S. 77, 96-97 (2010). “The
 2 federal diversity jurisdiction statute provides that [1] ‘a corporation shall be
 3 deemed to be a citizen of any State by which it has been incorporated *and of the*
 4 *State where it has its principal place of business.*’ 28 U.S.C. § 1332(c)(1) (emphasis
 5 added)” *Hertz Corp. v. Friend*, 559 U.S. 77, 80, (2010). The phrase “principal place
 6 of business” in 28 U.S.C.S. § 1332(c)(1) refers to the place where the corporation’s
 7 high level officers direct, control, and coordinate the corporation’s activities. Courts
 8 have often metaphorically called that place the corporation’s “nerve center.” The
 9 “nerve center” will typically be found at a corporation’s headquarters. *Hertz Corp.*
 10 *at 77.*

11 **B. Motion to Dismiss Under Rule 12(b)(6)**

12 On Rule 12(b)(6) motions, claims are subject to dismissal based on a
 13 dispositive legal issue, *Seismic Reservoir 2020, Inc. v. Paulsson*, 785 F.3d 330, 335
 14 (9th Cir. 2015), or for failure to plead “sufficient factual matter, accepted as true, to
 15 ‘state a claim to relief that is plausible on its face,’” *Ashcroft v. Iqbal*, 129 S. Ct.
 16 1937, 1939 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
 17 *Twombly* and *Iqbal* apply with equal force to Rule 12(b)(1) motions challenging the
 18 existence of Article III standing on the face of the complaint. *See Terenkian v.*
 19 *Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012).

20 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the
 21 legal sufficiency of a claim. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).
 22 Dismissal may be based on the lack of a cognizable legal theory or the absence of
 23 sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police*
 24 *Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). In *Ashcroft v. Iqbal*, the Supreme Court
 25 elaborated on the standard for evaluating pleadings in conjunction with a motion to
 26 dismiss filed pursuant to Rule 12(b)(6). 129 S. Ct. 1937, 1949-50 (2009) (*internal*
 27 *citations omitted*). The Supreme Court suggested a three-step process for courts to
 28 apply in considering a motion to dismiss. First, the Court must identify the elements

1 of the cause of action in light of interpreting case authority. *Id.* at 1947. Second, the
 2 Court should begin “by identifying pleadings that, because they are no more than
 3 conclusions, are not entitled to the assumption of truth.” *Id.* at 1949-50. Third, the
 4 Court must consider any remaining factual allegations to “determine whether they
 5 plausibly give rise to an entitlement of relief.” *Id.* at 1950.

6 **IV. ARGUMENT**

7 **A. The Complaint Should Be Dismissed Because Plaintiff Has 8 Failed to Plead Complete Diversity Jurisdiction**

9 **1. Plaintiff Fails to Plead Complete Diversity.**

10 Plaintiff has failed to plead diversity jurisdiction. “[A] corporation shall be
 11 deemed to be a citizen of every State and foreign state by which it has been
 12 incorporated **and** of the State or foreign state *where it has its principal place of*
 13 *business...*” 28 U.S.C.S. § 1332(c)(1) (*emphasis added*); *see also Inland Rubber*
 14 *Corp. v. Triple A Tire Serv., Inc.*, 220 F. Supp. 490, 491 (S.D.N.Y. 1963) (stating
 15 “[28 U.S.C.S. §] 1332 is amended to provide that in cases based upon diversity of
 16 citizenship a corporation shall be deemed a citizen both of the State of its creation
 17 and the State in which it has its principal place of business.”)

18 The Complaint fails to establish that the Plaintiff is of a different state
 19 citizenship than all of the Defendants. *Caterpillar Inc.*, 519 U.S. at 68. The
 20 Complaint indicates that Plaintiff Lehman is an individual who lives in
 21 Germantown, New York. (Compl. at ¶¶ 7, 12; ECF No. 4) Defendant MediaLab is
 22 incorporated in Delaware with a principal place of business in Los Angeles, CA,
 23 and Defendant Otin Holdings, LLC, is incorporated in Delaware. (Compl. ¶ 12,
 24 ECF No. 3-1). However, Plaintiff alleges that Defendant Otin Holdings, LLC has
 25 “**no physical presence in any state**” and “**does not know the identities or**
 26 **citizenship** of the members of Otin Holdings other than Brad Brooks.” (Compl. ¶ 9,
 27 ECF No. 3-1)(*emphasis added*). Further, Plaintiff states that the “Doe Defendants”
 28 are entities that loaned money to MediaLab, and their citizenship is *not known* to
 Plaintiff.” (Compl. ¶ 12; ECF No. 3-1).(emphasis added).

1 Accordingly, diversity jurisdiction has not been sufficiently plead because
 2 Plaintiff has not alleged where Otin Holdings' principal place of business is.
 3 Plaintiff alleges that Otin Holdings has no physical presence in any state and that
 4 he is not aware of the identities or citizenship of its members. Plaintiff speculates
 5 based on the alleged residence of one member of the entity, and concludes that it is
 6 sufficient for jurisdiction. For purposes of complete diversity, an entity's principal
 7 place of business must be plead and cannot be excluded. Otin Holdings or any DOE
 8 could very well be a citizen of New York. There must be complete diversity for the
 9 Court to have subject matter jurisdiction.

10 **2. Plaintiff Fails to Plead Amount in Controversy**

11 With respect to the amount in controversy, Plaintiff alleges that the amount in
 12 controversy exceeds \$75,000" and accordingly, diversity jurisdiction exists. When
 13 a complaint includes legal conclusions, they are not accepted as true "even if 'cast
 14 in the form of factual allegations.'" *Lacano Invs., LLC v. Balash*, 765 F.3d 1068,
 15 1071 (9th Cir. 2014) (emphasis in original) (quoting *Doe v. Holy See*, 557 F.3d
 16 1066, 1073 (9th Cir. 2009)). *Frysinger v. Mitchell*, No. 22-00049 SOM-RT, 2022
 17 U.S. Dist. LEXIS 198436, at *3 (D. Haw. Nov. 1, 2022). Plaintiff only alleges that
 18 "[t]he amount Otin Holdings was supposed to pay for Mr. Lehman's remaining
 19 MediaLab's shares is more than \$75,000." (Compl. ¶ 41, ECF No. 3-1). However,
 20 Plaintiff did not indicate with any specificity the amount on the face of the
 21 Complaint.

22 Accordingly, the Complaint must be dismissed for failure to adequately plead
 23 diversity jurisdiction.

24 **B. The Fraud Claim Should Be Dismissed Because The** 25 **Complaint Analyzes The Claim Under California Law, But** 26 **Delaware Law Is Applicable Pursuant To The Agreement.**

27 Plaintiff's claims are based on the Put Agreement entered into between
 28 Plaintiff, MediaLab and Otin Holdings. Plaintiff asserts subject matter jurisdiction
 under 28 U.S.C. § 1332. "Except in matters governed by the U.S. Constitution or by

1 acts of Congress, the law to be applied in any case is the law of the state.” *Erie R.R.*
 2 *v. Tompkins*, 304 U.S. 64, 69 (1938). Accordingly, the law applied to this case is
 3 the substantive law of the state.

4 Here, Plaintiff twice cites to § 14 of a Put Agreement, as a basis for jurisdiction
 5 and venue in this Court. (Compl. ¶¶ 13, 19; ECF No. 3-1). Immediately preceding
 6 the sentence in Section 14, is a Delaware choice of law provision (“This Agreement
 7 shall be governed by and construed in accordance with the internal laws of the State
 8 of Delaware without giving effect to any choice or conflict of law provision or rule
 9 (whether of the State of Delaware or any other jurisdiction) that would cause the
 10 application of Laws of any jurisdiction other than those of the State of Delaware.”))
 11 (Pessah Decl. ¶ 8).

12 “California generally enforces parties' freely-negotiated choice-of-law clauses.
 13 It is to the interest of the public generally that the right to make contracts should not
 14 be unduly restricted, and no agreement will be pronounced void, as being against
 15 public policy unless it clearly contravenes that which has been declared by statutory
 16 enactment or by judicial decisions to be public policy, or unless the agreement
 17 manifestly tends in some way to injure the public.” *First Intercontinental Bank v.*
 18 *Ahn*, 798 F.3d 1149, 1152 (9th Cir. 2015).

19 As Delaware law applies to Plaintiff’s claims, claims based on California
 20 statutes, must be dismissed. *See Vichi v. Koninklijke Philips Elecs. N.V.*, 85 A.3d
 21 715 772 (Del. Ch. 2014) (finding that where English law did not apply, a party could
 22 not invoke an English statute.)

23 Here, Plaintiff’s Fraud claim is based on California Civil Procedure §§ 1572,
 24 1709, and 1710. (Compl. 14: 15-17; ECF No. 3-1). Accordingly, the Fraud claim
 25 must be dismissed. Additionally, the breach of contract claim fails to state which
 26 law is applicable, so to the extent the claim is applied under California law, it must
 27 be dismissed as well.
 28

C. Plaintiff Fails to Plead the “Alter Ego” Theory On Which His Fraud Claim Would Need to Rely for Michael Heyward.

Plaintiff fails to plead alter ego liability for Defendant Heyward. Plaintiff alleges that Michael Heyward, CEO of MediaLab, is individually liable for the Fraud Claim set forth in the Complaint. Plaintiff’s claims all arise out of the Put Agreement, to which Michael Heyward is not an individual party. However, notably absent from the Complaint are any allegations that Heyward is the alter ego of MediaLab, let alone the bare elements of an alter ego theory. Even if the Complaint did contain allegations of alter ego, Plaintiff never could validly make any such allegation. Plaintiff vaguely directs all of his allegations for Fraud against multiple Defendants, rather than any Defendant in particular.

To establish “alter ego” liability, a plaintiff must plead facts demonstrating “that in all aspects of the business, the [defendant] corporations actually functioned as a single entity.” *Energy Marine Servs., Inc. v. DB Mobility Logistics AG*, No. CV 15-24-GMS, 2016 WL 284432, at *3 (D. Del. Jan. 22, 2016) (granting motion to dismiss alter ego claim based on “purely conclusory assertions”). This analysis involves weighing several factors, including “gross undercapitalization, failure to observe corporate formalities, nonpayment of dividends, insolvency of debtor corporation, siphoning of funds from the debtor corporation[,] nonfunctioning of officers and directors, absence of corporate records, and whether the corporation is merely a facade for the operations of the [principal].” *Id.* Plaintiff must also establish that the “corporate form was abused, with a showing akin to fraud.” *Id.*

Here, Plaintiff’s alter ego allegations are devoid of any alter ego allegations and fail to even recite the bare bones elements of alter ego liability. This sort of boilerplate pleading does not establish alter ego liability and is insufficient to survive a Rule 12 motion. Even if Plaintiff recited the general elements of alter ego liability, it is still insufficient. *See, e.g., MH Pillars Ltd. v. Realini*, No. 15-CV-1383-PJH, 2017 WL 916414, at *14 (N.D. Cal. Mar. 8, 2017) (dismissing complaint

1 that “contain[ed] primarily conclusory allegations that merely recite the factors
 2 considered by courts when evaluating alter ego claims”); *Emps. Tr. Fund v. Am.*
 3 *Empire Bldg. Corp.*, No. 14-CV-04054 NC, 2015 WL 4538070, at *3 (N.D. Cal.
 4 July 27, 2015) (dismissing “alter ego” claim premised on a “formulaic recitation of
 5 the elements of alter ego liability,” pled “on information and belief” “without any
 6 further factual allegations”); *All Cities Realty, Inc. v. Hollymax Realty, Inc.*, No.
 7 SACV08195AHSMLGX, 2010 WL 11523916, at *2 (C.D. Cal. Jan. 21, 2010)
 8 (dismissing with prejudice complaint that “simply list[ed] the elements typically
 9 evaluated in determining alter ego liability” but did not “allege the facts supporting
 10 each,” despite an opportunity to amend) (quotations and alteration omitted).

11 Plaintiff’s Fraud Claim fails to state any facts to justify piercing the corporate
 12 veil. *See MH Pillars*, 2017 WL 916414, at *14 (rejecting “alter ego” theory where
 13 complaint did “not allege facts showing what each individual defendant did that
 14 would justify piercing the corporate veil”); *Nat’l Standard Fin. LLC v. Physicians*
 15 *Hosp. of Desert Cities LLC*, No. EDCV 13-0010-DTB, 2013 WL 12131185, at *6
 16 (C.D. Cal. May 9, 2013) (dismissing claims based on “alter ego” theory where
 17 “Plaintiffs refer to all defendants collectively, but fail to identify any actions
 18 personally taken by an Individual defendant”); *Kingsburg Apple Packers, Inc. v.*
 19 *Ballantine Produce Co.*, No. 1:09-CV-901-AWI-JLT, 2010 WL 2817056, at *5
 20 (E.D. Cal. July 16, 2010) (rejecting “alter ego” theory where plaintiff alleged
 21 “wrongful conduct on behalf of all defendants” without “indicat[ing] what each
 22 [d]efendant did that would justify piercing the corporate veil”).

23 Additionally, Plaintiff does not plead the fraud element of its alter ego theory
 24 with the required particularity. “Piercing the corporate veil under the alter ego
 25 theory requires that the corporate structure cause fraud or similar injustice.”
 26 *Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood*, 752 A.2d
 27 1175, 1184 (Del. Ch. 1999) (“grant[ing] defendant’s motion to dismiss plaintiffs’
 28 claim to pierce the corporate veil of the General Partner”). “Effectively, the

1 corporation must be a sham and exist for no other purpose than as a vehicle for
 2 fraud.” *Id.* Accordingly, the Fraud claim against Defendant Heyward must be
 3 dismissed.

4 **D. Plaintiff’s Fraud Claim Fails under FRCP Rule 9(b),**
 5 **Delaware and California law.**

6 ***1. Plaintiff Failed To Plead His Fraud Claim With***
 7 ***Sufficient Particularity Under FRCP Rule 9(B),***
 8 ***Delaware And California Law.***

9 While notice pleading is the standard for most cases, there is a higher pleading
 10 requirement for allegations of fraud. Under Fed. R. Civ. P. (“Rule”) 9(b), Plaintiff
 11 is required to state the circumstances of his allegations of fraud with particularity.
 12 Fed. R. Civ. P. 9(b); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124-25 (9th Cir.
 13 2009). Specifically, Rule 9(b) states that “a party must state with particularity the
 14 circumstances constituting fraud...” *Id.*; *Kearns*, 567 F.3d at 1124 (“Averments of
 15 fraud must be accompanied by the who, what, when, where, and how of the
 16 misconduct charged.”) (internal quotations and citations omitted). Moreover, Rule
 17 9(b) requires more than conclusory allegations that certain statements were
 18 fraudulent. *Rosal v. First Fed. Bank of Cal.*, 671 F. Supp. 2d 1111, 1132 (N.D. Cal.
 19 2009) (dismissing fraud claim where plaintiff plead “vague and conclusory
 20 allegations against FFB without any information as to the who, what, when, where,
 21 and how of the fraudulent concealment.”).

22 Likewise in Delaware, the Complaint must state the circumstances
 23 constituting fraud according to the heightened pleading standard of particularity.
 24 (See Super. Ct. Civ. R. 9(b); Del. Ch. Ct. R. 9(b); *Young & McPherson Funeral*
 25 *Home, Inc. v. Butler’s Home Improvement, LLC*, 2015 WL 4656486, at *3 (Del.
 26 Super. Aug. 6, 2015) (quoting *Metro Commc’n Corp. BVI v. Advanced*
 27 *Mobilecomm Techs. Inc.*, 854 A.2d 121, 144 (Del. Ch. 2004))

28 To satisfy the pleading requirements in Delaware, the plaintiff must allege
 facts showing: (a) the circumstances of the misrepresentation, including: the timing,

1 place, and contents of the misrepresentation; (b) the identity of the person making
 2 the misrepresentation; and (c) what defendant intended to gain by making the
 3 misrepresentation. *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d
 4 1032, 1050 (Del. Ch. 2006).)

5 For the sake the argument as well, in California, Fraud must be plead with
 6 specificity as well. *West v. JPMorgan Chase Bank, N.A.*, 214 Cal. App. 4th 780,
 7 793 (2013). “The specificity requirement means a plaintiff must allege facts
 8 showing how, when, where, to whom, and by what means the representations were
 9 made, and, in the case of a corporate defendant, the plaintiff must allege the names
 10 of the persons who made the representations, their authority to speak on behalf of
 11 the corporation, to whom they spoke, what they said or wrote, and when the
 12 representation was made.” *Id.* (internal citations omitted).

13 Plaintiff’s allegation of fraud is wholly conclusory and unsubstantiated by any
 14 specific factual details. Plaintiff claims in general that promises were made
 15 “through the Put Agreement” by “MediaLab, Otin Holdings, and Mr. Heyward.”
 16 (See Compl. ¶ 69, ECF No. 3-1). Plaintiff inexplicably fails to (1) provide a copy
 17 of the Put Agreement on which the Fraud claim is based, and (2) fails to specify
 18 which, if any, of the fore-cited provisions (contained in Complaint ¶¶ 35-37; ECF
 19 No. 3-1) are at issue, or if perhaps, some other statement might constitute the
 20 allegedly fraudulent “promises.” The alleged misrepresentation appears to be that
 21 Defendants “promised Mr. Lehman through the Put Agreement that Otin Holdings
 22 would purchase Mr. Lehman’s MediaLab shares and that MediaLab would fund
 23 those purchases.” (Compl. ¶ 69; ECF No. 3-1). However, this does not demonstrate
 24 the necessary misrepresentation of a present fact. The Complaint simply states the
 25 terms of exchanged promises constituting an agreement. Mr. Lehman has failed to
 26 specify which statements were materially false, when they were made, how they
 27 were made, who made them and why there were false. Although Plaintiff gives a
 28

1 date for the effectiveness of the Put Agreement, Plaintiff vaguely states that the
2 representations at issue were made “through the Put Agreement.”

3 In addition to the failure to specify when the statements were made, the Fraud
4 claim fails to establish which persons actually made these “promises.” The Fraud
5 Claim alleges “based on information and belief” that Defendants “knew” that “at
6 the time they induced Mr. Lehman to enter the Put Agreement that MediaLab had
7 promised or would soon promise MediaLab’s lenders that MediaLab would not
8 perform its obligations to Mr. Lehman under the Put Agreement.” (Compl. ¶ 70,
9 ECF No. 3-1). Without knowing the provisions at issue, it is unclear which
10 combination of Defendants “they” refers to as having induced Mr. Lehman to enter
11 the Put Agreement.

12 Furthermore, since the allegation of knowledge occurred “at the time they
13 induced” entry into the Put Agreement, but the alleged misrepresentation appears
14 to be “through the Put Agreement,” the time and date of any alleged
15 misrepresentation is set off from the effective date of the Put Agreement. Were
16 promises made through the Put Agreement also made in advance of the entry? Or
17 only upon the effective date? If Defendants need to prepare defenses against alleged
18 representations, statements or omissions in advance of the effective date of the Put
19 Agreement that “induced [Plaintiff] to enter the Put Agreement,” Plaintiff has
20 wholly failed to identify what statements are issue, when they were made, by whom.

21 Without more, Defendants lack sufficient notice to defend against the claim
22 and are left guessing which provisions, statements, or other representations—made
23 by persons uncertain, in an uncertain chronology—Plaintiff contends were
24 fraudulently made. Plaintiff’s Fraud claim must be dismissed because it is not
25 pleaded with the requisite particularity.

26 ***2. Plaintiff Cannot Demonstrate Justifiable Reliance*** 27 ***Under Delaware Law***

28 Under Delaware Law, the elements of a claim for fraud at common law consist
of: “1) a false representation, usually one of fact, made by the defendant; 2) the

defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; 3) an intent to induce the plaintiff to act or to refrain from acting; 4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and 5) damage to the plaintiff as a result of such reliance.” *Stephenson v. Capano Development, Inc.* 462 A.2d 1069, 1074 (Del. 1983) (citing *Nye Odorless Incinerator Corp. v. Felton*, 162 A. 504, 510–11 (Del. Super. 1931); W. Prosser, *Law of Torts*, 685–86 (4th ed. 1971)).¹ In this instance, Plaintiff fails to present any substantiated facts demonstrating a detrimental and justifiable reliance on these promises. Instead, Plaintiff merely offers a bare conclusory statement asserting that he “reasonably relied” on such promises. (Compl. ¶ 72, ECF No. 3-1). Accordingly, the Fraud Claim must be dismissed.

3. *Plaintiff Has Not Demonstrated Damages As a Result of Reliance*

Under Delaware law, Plaintiff must have suffered damages as a result of its reliance.² *Stephenson*, 462 A.2d at 1074. Plaintiff alleges the damage is the failure to purchase shares “as required by the Put Agreement.” (Compl. ¶ 74, ECF No. 3-1). This cannot plausibly show detrimental reliance on alleged misrepresentations, since it would be the very same harm incurred by the alleged breach of contract. Moreover, this would be an economic harm for which the remedies in the event of breach were expressly contracted for by the parties in allocating risks of the alleged acquisition. (*see* Compl. ¶¶ 22-23, ECF No. 3-1). Taking the allegations of the Complaint as true, Plaintiff has merely restated the alleged harm that follows from the alleged breach of contract. Plaintiff has not alleged any harm related to fraudulent statements or his reliance thereon. Separate and apart from application

¹ A fraud claim requires proof of justifiable reliance under California law as well. *Kenney v. Deloitte, Haskins & Sells*, No. C 91-0590 BAC, 1992 U.S. Dist. LEXIS 14600, at *6 (N.D. Cal. Sept. 1, 1992).

² While California law is inapplicable here, Plaintiff’s claim fails under California law as well. To state a claim for fraud under California law, a plaintiff’s complaint must plausibly allege: (1) a misrepresentation; (2) made with knowledge of its falsity; (3) with the intent to induce reliance; and (4) which did induce a justifiable reliance; (5) causing damages. *Schwarzkopf v. IBM*, 2010 U.S. Dist. LEXIS 46813, at *42 (N.D. Cal. May 12, 2010) (citing *Gabana Gulf Distrib., Ltd. v. Gap Int’l Sales, Inc.*, No. C 06-02584 CRB, 2008 U.S. Dist. LEXIS 1658, at *25 (N.D. Cal. Jan. 9, 2008)).

1 of the economic loss rule (discussed below), the Complaint cannot logically sustain
 2 Plaintiff's claim as no harm flows from any detrimental reliance on the alleged
 3 misrepresentation.

4 **E. The Fraud Claim Should Be Dismissed Because The**
 5 **Economic Loss Rule Bars Recovery, And No Exception**
 6 **Applies**

7 In California, a party cannot seek damages that are purely economic for
 8 alleged "fraud" based on acts that arise from an alleged breach of contract.³
 9 *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal.4th 979, 988 (2004) ("[the
 10 economic loss doctrine] requires a purchaser to recover in contract for purely
 11 economic loss due to disappointed expectations, unless he can demonstrate harm
 12 above and beyond a broken contractual promise."). In short, "[t]he fundamental rule
 13 in California is that no tort cause of action will lie where the breach of duty is
 14 nothing more than a violation of a promise which undermines the expectations of
 15 the parties to an agreement." *Oracle USA, Inc. v. XL Global Services, Inc.*, No. C
 16 09-00537, 2009 WL 2084154, at *4 (N.D. Cal. July 13, 2009). The economic loss
 17 rule serves a valuable purpose to " 'prevent[] the law of contract and the law of tort
 18 from dissolving one into the other.' " *Id.* (quoting *Rich Products Corp. v. Kemutec,*
 19 *Inc.*, 66 F.Supp.2d 937, 969 (E.D.Wis.1999)). Limited exceptions include physical
 20 injury resulting from breach of duty, wrongful discharge of employee in violation
 21 of public policy, or a contract is fraudulently induced. *Id.* Nowhere does Plaintiff
 22 allege any harm to person or property, or wrongful discharge in violation of public
 23 policy. The fraudulent inducement exception, for reasons discussed herein, also
 24 does not apply. The California economic loss rule therefore bars the Fraud Claim
 25 and it is thus suitable for dismissal, with prejudice, under Rule 12(b)(6) as legally
 26 insufficient to state a claim for relief from this Court.

27 ³ Delaware courts apply the economic loss rule in a stricter fashion. A party may recover in tort only if losses are
 28 accompanied by bodily harm or property damage. *Millsboro Fire Co. v. Constr. Mgmt. Serv.*, No. 05C-06-137
 MMJ, 2006 Del. Super. LEXIS 536, at *6 (Super. Ct. June 7, 2006). "In Delaware, only surveyors and those
 expressly in the business of supplying information such as accountants, financial advisors, and title searchers, can
 be liable in tort for purely economic losses." *Id.* at 8.

1 Plaintiff replicates the same allegations of economic damage in its breach of
 2 contract claim (Count I) as in his Fraud Claim. In alleging breach of contract,
 3 Plaintiff alleges the breach is that of “**failing to purchase Mr. Lehman’s shares**
 4 on or before September 13, 2023” and by “failing to issue and fund [a] letter of
 5 credit” intended “**to fund those purchases.**” (See Comp. at ¶¶ 2, 58-59; ECF No.
 6 3-1) (emphasis added) The Fraud Claim alleges that “Mr. Lehman was harmed
 7 when MediaLab and Otin Holdings **did not purchase [Mr. Lehman’s] Medialab**
 8 **shares** on September 13, 2023 as required by the Put Agreement.” (Compl.¶ 74,
 9 ECF No. 3-1) (emphasis added). The alleged harm—the non-purchase of shares
 10 “as required by the Put Agreement”—constitutes the precise economic damages of
 11 breach of contract. Since Plaintiff does not, and cannot, allege “harm above and
 12 beyond a broken contractual promise” the economic loss rule bars his recovery
 13 under a Fraud Claim and he must seek to “recover in contract for purely economic
 14 loss due to disappointed expectations.” See *Robinson*, 34 Cal.4th at 988; *c.f. Lazar*
 15 *v. Superior Court*, 12 Cal. 4th 631, 643 (1996) (reasoning that precedent barring
 16 fraud claim not applicable where an employee alleges both (i) harms different from
 17 breach of the contract and (ii) detrimental reliance on misrepresentations made
 18 external to and in advance of entry into such contract).

19 Courts also refuse to raise fraud claims from the dead, *Lazar*-like, through the
 20 inducement exception if the alleged damages or misrepresentation are congruent
 21 with a breach claim. See *Foster Poultry Farms v. Alkar-RapidPak-MP Equipment,*
 22 *Inc.* 868 F. Supp.2d 983, 993 (E.D. Cal. 2012) (discussing examples where courts
 23 have held that fraud claims hinging on inducement in which “the misrepresentation
 24 that forms the basis of the fraud claim is the contract itself ... are barred by the
 25 economic loss doctrine.”). The Court in *Oracle* cautioned that “[v]irtually any time
 26 a contract has been breached, the party bringing suit can allege that the breaching
 27 party never intended to meet its obligations” thus permitting the inducement
 28 exception under similar circumstances risked “collaps[ing] the carefully-guarded

1 distinction between contract and tort law.” WL 2084154 at *7 (N.D. Cal. Jul. 13,
 2 2009). In *Multifamily Captive Group, LLC v. Assurance Risk Managers, Inc.*, the
 3 court found that fraud claims were barred because damages sought were the same
 4 as those arising from breach of the agreement, observing that: “To allow a fraud
 5 claim under these facts would ‘open the door to tort claims in virtually every case
 6 in which a party promised to make payments under a contract but failed to do so.’
 7 ” 629 F.Supp.2d 1135, 1146 (E.D. Cal. 2009) (quoting *Intelligraphics, Inc. v.*
 8 *Marvell Semiconductor, Inc.*, No. C07–02499 JCS, 2009 WL 330259, at *17 (N.D.
 9 Cal. Feb. 10, 2009).

10 Applying a charitably narrow lens to ignore the particularity issues, the most
 11 specific statement in the Fraud Claim characterizing the alleged misrepresentation
 12 is that Defendants “promised Mr. Lehman **through the Put Agreement** that Otin
 13 Holdings would purchase Mr. Lehman’s MediaLab shares and that MediaLab
 14 would fund those purchases.” (Compl. ¶ 69, ECF No. 3-1) (*emphasis added*). This
 15 “alleged misrepresentation that forms the basis” of the Fraud Claim is plainly that
 16 of “the contract itself.” *See Alkar* 868 F. Supp.2d at 993. Plaintiff cannot sustain its
 17 claim by casting an allegedly broken promise within a contract as fraudulent
 18 inducement into the self-same contract.

19 Ultimately, the only harm alleged is a failure to pay pursuant to a contract.
 20 The economic loss rule applies in such a case concerning purely economic damages.
 21 *Robinson*, 34 Cal.4th at 988. An inducement exception does not apply since
 22 Plaintiff’s Fraud Claim alleges that promises made “through the Put Agreement”
 23 constitute the necessary misrepresentations for fraudulent inducement. *See Alkar*,
 24 *supra*, at 993. As Plaintiff alleges that Defendants “promised to make payments
 25 under a contract but failed to do so” to permit the exception would risk opening the
 26 door to tort claims in “virtually every case [of non-payment].” *See Multifamily* at
 27 1146. The economic loss rule bars the requested relief and no exception applies,
 28

1 therefore the Fraud Claim is not legally cognizable and must be dismissed pursuant
2 to 12(b)(6).

3 **F. Plaintiff Has Waived Jury Trial**

4 Plaintiff makes a demand for jury trial in the Complaint. However, pursuant
5 to the Put Agreement it seeks to enforce, Plaintiff has waived jury trial. Under
6 section 15 of the Put Agreement, “Each party irrevocably and unconditionally
7 waives any right it may have to a trial by jury in respect of any legal action arising
8 out of or relating to this Agreement or the transactions contemplated hereby. Each
9 party to this Agreement certifies and acknowledges that (a) no representative of any
10 other party has represented, expressly or otherwise, that such other party would not
11 seek to enforce the foregoing waiver in the event of a legal action; (b) such party
12 has considered the implications of this waiver; (c) such party makes this waiver
13 voluntarily; and (d) such party has been induced to enter into this Agreement by,
14 among other things, the mutual waivers and certifications in this Section 15.”
15 Accordingly, Plaintiff has waived its right to a jury trial.

16 **G. In the Alternative, The Court Should Stay This Action Until 17 the Arbitration is Complete.**

18 As stated herein, the parties are concurrently engaged in Arbitration based
19 upon the same nucleus of facts. Specifically, Plaintiff and Defendants concurrently
20 entered into two agreements following the acquisition of Plaintiff’s company. Now,
21 Plaintiff brings two separate actions against Defendants based upon the agreements.
22 Thus, should the Court deny Defendants’ Motion, Defendants respectfully request
23 the Court to stay this action pending resolution of the Arbitration.

24 **V. CONCLUSION**

25 For the reasons set forth above, Defendants MediaLab.AI, Inc. and Michael
26 Heyward respectfully request that the Court grant its Motion to Dismiss Plaintiff’s
27 Complaint. In the alternative, Defendants request the Court to dismiss the fraud
28 claim and stay this action until the arbitration has been concluded.

1
2 Dated: January 15, 2024

PESSAH LAW GROUP, PC

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4
5 By: /s/ Maurice Pessah

6 Maurice D. Pessah
7 Attorneys for Defendants,
8 MEDIALAB.AI, INC. and
9 MICHAEL HEYWARD
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